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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 278

CONCORDIA INSURANCE COMPANY OF MILWAUKEE, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 279

ROYAL INSURANCE COMPANY, LTD., PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 280

NATIONAL FIRE INSURANCE COMPANY, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

No. 281

FIRE ASSOCIATION OF PHILADELPHIA, PETITIONER,

vs.

SCHOOL DISTRICT No. 98 OF PAYNE COUNTY, OKLAHOMA.

BRIEF OF PETITIONERS.

F. A. RITTENHOUSE,
H. C. THURCAN,
Counsel for Petitioners.

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BRIEF OF PETITIONERS.

In this case, writ of certiorari was allowed from the Circuit Court of Appeals for the Tenth Circuit. The

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issues are confined to the transcript, as the Circuit Court of Appeals for the Tenth Circuit sustained a motion to strike the record of the testimony and proceedings at the trial under the rules of court requiring the testimony to be set out in narrative form and not by questions and answers. The principal issues in the case, therefore, are two:

First, the trial court allowed interest from May 2, 1926, that being 60 days from the time proofs of loss should have been filed, though not filed, and the Circuit Court of Appeals for the Tenth Circuit affirmed the holding of the trial court on the question of interest.

Second, the trial court held that the oral waiver pleaded in the petitions in these cases was sufficient and that there could be an oral waiver of the terms and conditions of the insurance policy requiring proof of loss within sixty days from the date of the fire, unless the time is extended in writing by the company. The Circuit Court of Appeals for the Tenth Circuit affirmed this holding, which we contend is error under the decisions of the Supreme Court of the United States and the opinions of the Circuit Court of Appeals of the Eighth Circuit, and numerous other authorities.

Statement of Facts.

In the fifth paragraph of each petition, plaintiff alleges an oral waiver of the filing of written verified proofs of loss as required by the terms of the policy, by reason of statements made by the adjusters representing the companies, and after alleging the appoint-

ment of the adjusters, alleged that they came to the scene of the loss and viewed said property, and requested Plans and Specifications of the building and they allege as follows:

> "That said adjusters for said companies visited the scene of said fire and made examinations as to the value of the property destroyed and the circumstances surrounding said fire and had plaintiff to furnish them, said adjusters, with the items of said property so destroyed and the plans and specifications of the building, all of which was furnished by said plaintiff at the request of said adjusters as aforesaid, and said plaintiff was requested to and did furnish such assistance in this regard as it could to Mr. Frank Kebelman, who was the building contractor selected and appointed by said companies and their adjusters to make the estimate of such value of the property so destroyed and to obtain the correct information as to the condition of the property at the time of said loss as more fully appears by the letter from Fuller Adjustment Company dated February 3rd, 1926, copy of which is attached hereto and made a part hereof as Exhibit 'A'. Plaintiff further states that thereafter on the 27th day of February, 1926, which was on the fifty-sixth day after said fire, said adjusters, to-wit, Guy Fuller, Lloyd J. Mullen and Mr. Klein, met with the Board of said plaintiff, to-wit J. E. Quigley, G. D. Brooks and V. I. Langston, who were then said Board of said school, which meeting was held at Yale, Oklahoma, at the scene of said fire; that there was also present at said meeting said Mr. Frank Kebelman,

which meeting was held for the purpose of discussing the settlement and adjustment of said loss of plaintiff from said fire. That thereupon all of said insurance companies, acting through their said adjusters and agents, as aforesaid, at said meeting stated to the plaintiff, through its said Board, that they had made full and complete investigation as to said fire and the market value of the building and furniture and fixtures therein so destroyed by said fire and had obtained all and the correct information thereon and that there was no question as to the loss upon said furniture and fixtures in said sum of $3400.00 and that said insurance companies were then and there ready to pay said plaintiff that sum for its loss upon said furniture and fixtures, such payment to be pro rated among said insurance companies, stating at the same time that said furniture and fixtures were under valued for said insurance and were of a fair market value in excess of said sum of $3400.00. The said companies through their said adjusters and agents aforesaid at the same time stated that said building was over valued and could be replaced for the sum of approximately $53,000.00, and then said companies, through their said agents, offered the plaintiff the sum of approximately $56,000.00 as full payment for all of the loss to both said building and furniture and fixtures therein so destroyed by fire as aforesaid, payments to be pro rated among all of said insurance companies. The plaintiff declined to accept said amount and requested said insurance companies through their said adjusters to replace said building, inasmuch as said insurance companies contended that the same could be re-

placed for about $53,000.00 and had said Kebelman present with his figures to show that same could be replaced for about said amount. This, however, said insurance companies refused to do. Plaintiff further states that all of said property so destroyed by fire was destroyed at the same fire and all of the facts and circumstances relating to said furniture and fixtures also existed as to said building and said plaintiff had only given said insurance companies the same notice in the one instance as in the other, and said companies at said meeting offered to pay the full amount of the insurance on said furniture and fixtures as the same was undervalued, and the only question as to the said building was as to the value thereof and the replacement value, which said insurance companies contended was about $53,000.00 and which the plaintiff, through its Board, contended was of the value of $75,000.00; that the attention of said plaintiff and its Board was directed only as to the value of said building and the replacement value thereof and was the only matter discussed and as to which there was any disagreement at said meeting. That there was no objection made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that said insurance companies at said meeting by their said conduct in offering to pay the full amount of said insurance upon the furniture and fixtures, stating that the same was of a greater value than $3,400.00 at the time of the loss and their said acts and conduct in offering to pay the sum of $53,000 in payment of the loss of said building, stating and contending that said building was only of the value of about $53,-

000.00 at said time and could be replaced for said sum of about $53,000.00, thereby led the plaintiff to believe that the only matter in dispute between said plaintiff and said insurance companies was the market and replacement value of said building, the insurance companies contending on one hand that the market and replacement value was the sum of $53,000.00 and the said plaintiff contending that the same was $75,000.00 and this said defendant, together with the other insurance companies mentioned, has now, by reason of the facts aforesaid, waived the furnishing of proof of loss in strict accordance with the provisions of said policy and is estopped to set up and claim such failure as against the plaintiff in any particular. That said insurance companies through the examination and efforts of their said adjusters and through the assistance of said Board rendered at the request of said adjusters, obtained all of the information which could have been obtained had proof of loss been furnished in strict conformity to the policies of insurance and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss and that no other or further proof or information as to said loss was required but was waived.

"VII. Plaintiff alleges that it has performed all of the other conditions of said policy to be performed on its part, except the furnishing of said proof of loss which has been waived on the part of said defendant and as to which it is now estopped to set up such failure to the prejudice of any right of said plaintiff."

Each of the defendants demurred to this petition, the demurrer of the Concordia Insurance Company being shown at R. 19, and consisting of a general demurrer, while the demurrers of the other defendants are each identical, that of the National Fire Insurance Company being found at page 82, the grounds of demurrer being four in number and are as follows:

> "(1) That plaintiff's first amended petition wholly fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.
>
> "(2) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant for the reason that, as appears therefrom, the terms, provisions and conditions of the standard form of fire insurance policy therein sued upon were not complied with in that no proof of loss in the form required by such standard form policy was furnished to this defendant within the time and in the manner as required thereby; and in fact, has never been furnished as appears from said petition.
>
> "(3) That plaintiff's first amended petition herein is wholly insufficient to constitute a cause of action against this defendant in this, that the same does not state facts sufficient to establish a written waiver by this defendant of the requirements of said policy, and that under the decisions of the Federal Courts any waiver of the terms of the policy must be in writing, and it is not alleged in said first amended petition that said waiver was in writing; but that said plaintiff relies upon an oral

waiver which is not recognized under the Federal Rule.

"(4) That the original petition filed by the plaintiff did not state a cause of action for the reason that no proof of loss had been filed, and the plaintiff could not maintain an action without having filed such proof of loss, and that after the expiration of the statutory period of limitations, to-wit, one year, the plaintiff filed this first amended petition which sets up a cause of action based upon an alleged oral waiver, and that said first amended petition was not filed until after the running of the statute of limitations, and therefore, any cause of action on said policy is now barred by the statute of limitations."

The policies sued on in this case are Oklahoma Standard form policies, as provided by Section 6767, Compiled Oklahoma Statutes, 1921, and are on the only form of policy that can be written on schoolhouse property under the laws of the State of Oklahoma. Some of the policies were destroyed in the fire but plaintiff attaches to the petition in the case against the Royal Insurance Company a full copy of that policy (R. 39-42), and it was stipulated that the policies were all on the same form and contained the same terms and provisions as the Royal policy.

At page 39 of the record, we find the following provision contained in the insurance policy or contract sued on in this case:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to

this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

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> "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

At page 41, we find the following provision of the policy contract:

> "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

At page 33, we find this provision with reference to waiver contained in the policy, wherein it is provided that all waivers must be in writing and signed by the propert officials of the company and attached to the policy. This provision is as follows:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this policy

except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The Circuit Court of Appeals for the Tenth Circuit in the instant case, on the question of waiver and estoppel (R. 435), says (italics ours):

"The next question goes to the sufficiency of appellee's pleas of waiver and estoppel. Those pleas are challenged as to both law and fact. As to the first it is said, oral waivers of proof of loss are conclusively precluded by the terms of the contracts; and as to the second, the pleas are bad in point of fact. As to the first, certain conditions of the policies are relied on. Those conditions and their requirements are these: If a fire occurred the insured was to give immediate notice of any loss thereby in writing to the company, and within sixty days after the fire renders a statement to the company signed and sworn to by the insured stating his knowledge and belief as to the time and origin of the fire, the interest of insured and all others in the property, the cash value of each item and the amount of loss thereon, all encumbrances thereon, all other insurance, a copy of all descriptions and schedules in all policies, any changes in the title, use occupation, location, possession or exposure of the

property since the issuing of the policy, and by whom and for what purpose the building and its several parts were occupied at the time of the fire. That the company should not be held to have waived any provision or condition of the policy by any requirement, act or proceeding on its part relating to the appraisal or any examination provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company, including an award by appraisers when appraisal has been required. No suit or action on the policy for the recovery of any claim shall be sustainable in any court until after full compliance by the insured with all the foregong requirements, nor unless commenced within twelve months after the fire. In any matter relating to this insurance no person unless duly authorized in writing shall be deemed the agent of insurer. No officer, agent or other representative of the insurer shall have power to waive any provision or condition of the policy except such as by the terms of the policy may be the subject of agreement endorsed thereon or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached thereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached.

"The last noted provisions are aptly referable to certain contractual obligations as-

sumed by the insurers in the policies. For instance, the policy granted permission to make certain alterations, improvements and repairs and prohibited the making of other and more substantial work upon the building unless permission to do so is specifically covered by endorsement attached to the policy; no gasoline in excess of a certain amount could be kept or used on the premises unless permitted by endorsement on the policy. The building could not be abandoned for school purposes for an indefinite period without written permission endorsed on the policy. Permission was granted to use artificial or natural gas for fuel or light only when supplied through Public Service gas pipes. These all appear to be conditions affecting the insurer's risk, contractual obligations, and could not be waived except in the manner required, that is, by endorsement in writing.

"We pass now to a summary of the challenged pleas. The amended complaints alleged that on January 2, 1926, and within two or three hours after the fire had destroyed the building and furniture and fixtures therein, the plaintiff notified appellants' agents of the fire and the extent of the damage and destruction with the request that they notify their companies. That within two or three days thereafter the appellants selected named persons to represent them and authorized such persons to investigate the fire and make estimates as to the value of the property destroyed and settle for the loss; that these adjusters for the insurers visited the scene of the fire and made examinations as to the value of the property destroyed and the circumstances surrounding

the fire, and had plaintiff furnish them with the items of the property destroyed, the plans and specifications of the building, which plaintiff furnished, and requested plaintiff to furnish assistance to a building contractor selected and appointed by the insurers and their adjusters, who was to make estimates of the value of the property destroyed and collect information as to the condition at the time of the loss; that thereafter on the 27th day of February, 1926, which was the 56th day after the fire, the said adjusters and the members of plaintiff's board of trustees held a meeting at the scene of the fire; that said building contractor was at said meeting; that said meeting was held for the purpose of discussing the settlement and adjustment of the loss sustained by plaintiff; that thereupon all of the insurers, acting through their said adjusters and agents, stated to plaintiff's board that they had made full and complete investigation as to the fire and the market value of the building, and furniture and fixtures therein destroyed by said fire and had obtained all and the correct information thereon, that there was no question as to the loss upon the furniture and fixtures in the sum of $3,400.00 and that appellants were then and there ready to pay plaintiff that sum for its loss on the furniture and fixtures; that said insurers, through their adjusters and agents, at the same time stated that said building was overvalued and could be replaced for the sum of approximately $53,000, and then offered the sum of approximately $56,000 as full payment for all of the loss of both said buildings and furniture and fixtures destroyed; that plaintiff declined to accept said amount and requested the insur-

ance companies, through their adjusters, to replace said building, this however the insurers refused to do; that plaintiff's board at said meeting contended that the value of the building was $75,000; that the value of the building and its replacement cost were the only matters discussed as to which there was any disagreement; no objection was made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that the insurers at said meeting, by their conduct in offering to pay the full amount of insurance upon the furniture and fixtures and in offering to pay the sum of $53,000 for the loss of the building, led the plaintiff to believe that the only matter in dispute was the market and replacement value of the building, the appellants contending on the one hand that the market and replacement value was the sum of $53,000 and the plaintiff contending that the value was $75,000, and that by reason of the facts stated appellants waived the furnishing of proofs of loss in strict accordance with the provisions of the policies and are estopped to set up and claim such failure to furnish proofs; that appellants, through the examinations and efforts of their adjusters and the assistance of plaintiff's board rendered at the request of the adjusters obtained all the information which could have been obtained had proof of loss been furnished in strict conformity to the policies and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss.

"*After giving due consideration to all requirements of the policies to which we have made reference in above summary of their con-*

tents, we think the weight of authority is opposed to the contention that waivers of proof of loss in these cases could be made only in writing endorsed upon or attached to the policies. They could not be furnished until after the loss had occurred and liability of the insurers if any had accrued. The requirement was a *condition subsequent* and only provided means, if accepted as to verity, by which insurer's liability and its extent could be ascertained. But insurers were not bound to accept them, they could make their own investigation of the facts called for in the proof and stand on their conclusions so reached, in disregard of proof furnished. The policies provided that the loss should not become payable until sixty days after satisfactory proof of loss had been received by the insurer. Had the insurers stood by for the sixty days after the fire, during which time the insured might make proof of loss and no proof had been forthcoming, the insured would have been without right of recovery; or had proof been furnished within that time, the insurers, if not satisfied with the proof furnished, still had sixty days within which they could make their own investigation as to their liability and the extent thereof, before the loss became payable. That afforded them ample protection. They chose to ignore both alternatives. They sent their agents and adjusters to the scene of the fire within a few days after it occurred to make investigations and settlement with the insured. They called on the insured for assistance in making their investigations. That assistance was given. Its thoroughness cannot be doubted. All material facts must have been discovered. At least the pleas

were broad enough to admit proof they were discovered; and they were full enough to satisfy insurers in making a substantial offer of settlement on the 56th day after the fire $8,400 less than the judgments recovered. Under a policy with like conditions, in substance, to those here relied on, the Circuit Court of Appeals for the Ninth Circuit said, in Twin City Fire Ins. Co. *v.* Stockmen's National Bank, 261 Fed. 470, 476:

"'Clauses in insurance policies, prohibiting waiver unless the same is indorsed thereon, refer only to the provisions which enter into the contract of insurance, and they do not affect conditions which are to be performed after loss, such as furnishing proof of loss and giving notice. These may be waived, either by expressed words or by conduct inconsistent with an intention to enforce a strict compliance with the conditions, and which conduct is calculated to lead the insured to believe that the insurers do not intend to require such compliance. Insurance Co. *v.* Norton, 96 U. S. 234, 24 L. Ed. 689; Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Wheaton *v.* Insurance Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; McCollough *v.* Home Ins. Co., 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862. And an adjuster sent to adjust a loss presumably has authority to waive proof of loss. Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181; Popa *v.* Northern Ins. Co., 192 Mich. 237, 158

N. W. 945; Milwaukee Mechanic's Institute *v.* Fuquay, 120 Ark. 330, 179 S. W. 497; Lusk *v.* American Cent. Ins. Co., 80 W. Va. 39, 91 S. E. 1078; Wholley *v.* Western Assurance Co., 174 Mass. 54 N. E. 548, 75 Am. St. Rep. 314; Teasdale *v.* Insurance Co., 163 Iowa 596, 145 N. W. 284, Ann. Cas. 1916A, 591.'

"This ruling was adhered to by that court in Alliance Ins. Co. *v.* Enders, 293 Fed. 485. The Circuit Court of Appeals for the Sixth Circuit is in accord with the Ninth. In Continental Ins. Co. *v.* Fortner, 25 F. (2d) 398, 402, it said on the subject:

"'It is the prevailing rule that a clause in a policy of insurance prohibiting any waiver unless indorsed thereon refers only to those provisions of the policy which enter into and form part of the contract of insurance, and which may properly be designated as conditions; it has no reference to those stipulations which are to be performed after a loss has occurred, such as giving notice and furnishing preliminary proofs.'"

NOTE.—The case of Insurance Co. *v.* Norton, 96 U. S. 234, 24 L. Ed. 689, relied upon as the basis of the decision in this case, has no application in that said case had reference to the extension of the time of payment of a promissory note given for the premium and was not a construction of the terms and provisions of the policy contract.

The petition for writ of certiorari, briefly stated, is as follows:

1. That said judgments purport to and do decide an important question of local law, to

wit, the construction of a State statute on the question of interest, diametrically opposed to the construction placed on said statute by the Supreme Court of the State of Oklahoma in the case of American Eagle Fire Insurance Company *v.* Lively, 142 Okla. 246, 286 Pac. 797, decided on April 8, 1930, and in opposition to the decisions of the Supreme Court of the State of Oklahoma, in the following cases:

St. Paul Fire & Marine Insurance Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702;
City of Chickasha *v.* Hollingsworth, 56 Okla. 341, 155 Pac. 859;
Speed *v.* McMurray et al., 73 Okla. 325, 176 Pac. 506;
Midland Valley Railroad Co. *v.* Price, 127 Okla. 106, 260 Pac. 26;
Curtis-Gartside Company *v.* Aetna Life Insurance Co. (Okla.), 160 Pac. 465.

That said Circuit Court of Appeals refused to follow the statute of Oklahoma as construed in the above cases and based its decision upon another statute of the State of Oklahoma, to-wit, Section 5977, Compiled Oklahoma Statutes, 1921, which was inapplicable to this case. That the Supreme Court of Oklahoma has consistently held that interest runs from the date of judgment, which the Circuit Court of Appeals refused to follow, and decided otherwise.

2. That said judgments are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit, out of which the Circuit Court of Appeals for the Tenth Circuit was formed, namely, the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case

of Scottish Union & National Insurance Company *v.* Encampment Smelting Company, 166 Fed. 231, said case laying down the rule that the provision of the fire insurance policy requiring proof of loss to be filed within sixty days is a condition precedent to the right of action and can only be waived in writing, whereas, the opinion of the Circuit Court of Appeals for the Tenth Circuit held that said proof of loss could be orally waived.

3. Said judgments purported to decide an important question of general law in a way which is untenable and in conflict with the great weight of authority in that the Circuit Court of Appeals in the instant case holds that there can be an oral waiver of a proof of loss under the terms and provisions of the standard fire insurance policy sued on in this case, whereas, it is a well-settled principle of law in the Federal Courts that where a policy or contract of insurance contains a standard provision with reference to waiver, parol evidence cannot be introduced to establish waiver, and that there can be no waiver of any of the conditions or provisions except such waiver be in writing, signed by the insurer, or its duly authorized agent.

4. That said judgments purport to decide an important question of Federal law, to-wit, whether or not there can be an oral waiver of the provisions of a standard fire insurance policy requiring proof of loss to be filed in sixty days unless the time thereof be extended in writing by the company, which question has not been, but should be, settled by this Court.

In our brief in support of these assignments contained in the petitions for writ of certiorari, we cover them under two propositions:

I.

"That the judgments and opinions of the United States Circuit Court of Appeals for the Tenth Circuit purport to construe a State Statute of the State of Oklahoma different from and opposed to the construction given it by the Supreme Court of Oklahoma.

II.

"The judgments in question are in conflict with the rule laid down in Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231 (8th Cir.), and other Federal decisions holding that the provisions of a fire insurance policy requiring furnishing of proof of loss within sixty days after the date of loss is a condition precedent to the right to maintain action on the policy, and can be waived only in writing as provided by the policy sued on."

First Proposition.

Oklahoma Statutes on the Question of Interest

Section 5972, Compiled Oklahoma Statutes, 1921, is as follows:

"5972. Interest upon damages. Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover

> interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

Section 5977, Compiled Oklahoma Statutes, 1921, is as follows:

> "5977. Breach of obligation to pay money. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Oklahoma Decisions on the Question of Interest.

While it is true that there is an apparent conflict in some of the decisions of the Supreme Court of Oklahoma, yet when fully analyzed, we do not believe that there is any real conflict.

In the case of St. Paul Fire & Marine Ins. Co. *v.* Robinson, 72 Okla. 269, 180 Pac. 702, decided April 29, 1929, it was held:

> "4. Interest cannot be recovered upon unliquidated damages, where it is necessary for a judgment or verdict to be had in order to ascertain the amount of the same."

At page 270 of the Oklahoma Report, the Court in the opinion says:

> "The court instructed the jury that if it found for the plaintiff that it allow him interest at 6 per cent from December 1, 1916, on the amounts found, and it is urged by the defendant that said instruction is violative of section 2848, Rev. Laws of 1910. In the case of City of

Chickasha *v.* Hollingsworth, 56 Okla. 341, 15 Pac. 859, this court held that interest was not recoverable on unliquidated damages, where it was necessary for a judgment on verdict to be rendered in order to ascertain the amount of such damage. The instruction was therefore erroneous, and the judgment was excessive in the small amount of the interest so allowed, which is less than $5.

"The judgment will therefore be modified by deducting therefrom interest on the damages allowed from December 1, 1916, to the date of the verdict, which was April 17, 1917, and as so modified, will be affirmed."

In Curtis & Gartside Co. *v.* Aetna Life Ins. Co., 58 Okla. 470, 160 Pac. 465, decided October 10, 1916, it was held:

"4. The extent of the company's liability under such policy is governed by the terms of the contract, and is thereby limited to $5,000, and the expense of defending the action against the assured, if the company elects to defend, and the interest accruing on the judgment recovered in such action, pending an appeal therefrom, is not a part of such expense."

In the case of Midland Valley Ry. Co. *v.* Price, 127 Okla. 106, 260 Pac. 26, decided October 11, 1927, it was held:

"9. In an action for the death of 22 head of steers alleged to have been caused by the negligence of a common carrier, and for expenses incurred in the burial and disposition of said steers, and the damages for the loss of the

steers are based upon the market value, interest may be recovered prior to judgment, under sections 5972 and 5973, C. O. S. 1921."

(NOTE.—This interest was based upon the fact that cattle on a particular day had a particular market value.)

In the case of Speed *v.* McMurray, 73 Okla. 325, 176 Pac. 506, decided April 20, 1918, it was held:

"3. Interest cannot be recovered upon unliquidated damages, where it is necessary for a verdict to be had in order to ascertain the amount of the same."

In the case of Hartford Fire Ins. Co. *v.* Barnard, 99 Okla. 24, 221 Pac. 1011, decided December 11, 1923, it was held:

"1. In an action upon a fire insurance policy for unliquidated damages, if the damages are capable of ascertainment by computation, by reason of the property destroyed by fire having a well-established market value, the jury may return its verdict for interest on the amount of plaintiff's recovery dating from the time which the defendant ought to have satisfied the claim."

(NOTE: This is an action upon a fire insurance policy for the loss of an automobile which had a market value on the day of the fire.)

In the case of City of Chickasha *v.* Hollingworth, 56 Okla. 341, 155 Pac. 859, decided March 14, 1916, which was an action for breach of a contract to perform certain work and furnish certain machinery, the court held:

"2. Interest cannot be recovered upon unliquidated damages, where it is necessary for a judgment or verdict to be had in order to ascertain the amount of same."

In the case of American Eagle Fire Ins. Co. *v.* Lively, 142 Okla. 246, 286 Pac. 797, decided April 8, 1930, and in which the plaintiff seeks to recover upon a fire insurance policy for the loss of household goods and a library, the court, with reference to interest, held:

"3. Interest is not recoverable on unliquidated damages requiring judgment or verdict to ascertain amount thereof (Comp. St. 1921, sec. 5972).

In the body of the opinion, the court says:

"It is next contended that the trial court erred in allowing plaintiff interest prior to judgment—interest was allowed from date of filing suit. St. Paul Fire & Marine Ins. Co. *v.* Robison, 72 Okl. 269, 180 p. 702, and Schaff *v.* Hudgins, 96 Okl. 173, 221 p. 90, are cited in support of this contention. In our opinion these cases are controlling. Section 5972, C. O. S. 1921, provides: 'Any person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.'

> "Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof, we think interest should not have been allowed until the claim was reduced to judgment."

In the instant case, the loss was of a school house. It had no market value. It was not such property as was subject to barter and sale.

It is a well established principle of Federal law, and which we think is elementary, that the Federal Court is bound by the decisions of the State Court as to the construction of a statute by such State Court. This principle of law is established in the following cases:

Louisville Gas & Electric Co. *v.* Coleman, 48 Sup. Ct. 423, 227 U. S. 32, 72 L. Ed. 770;

Chicago, M., St. P. & P. R. Co. *v.* Risty, 48 Sup. Ct. 396, 276 U. S. 567, 72 L. Ed. 703;

Stebbins *v.* Riley, 45 Sup. Ct. 424, 268 U. S. 137, 69 L. Ed. 884;

Central Union Telephone Co. *v.* City of Edwardsville, 46 Sup. Ct. 90, 269 U. S. 190, 70 L. Ed. 229;

New York Life Insurance Co. *v.* Dunlevy, 214 Fed. 1, 130 C. C. A. 437, affirmed 36 Sup. Ct. 613, 241 U. S. 518, 60 L. Ed. 1140.

That decisions of a State Court of last resort construing a State statute will be followed by United States Courts, see

People's National Bank of Lynchburg *v.* Marye, 107 Fed. 570; decree modified and affirmed 24 Sup. Ct. 68, 191 U. S. 272, 48 L. Ed. 180,

and that the construction placed on a State statute by the State Court of last resort is binding on the Federal Courts, see further

Hunter *v.* City of Pittsburgh, 28 Sup. Ct. 40, 207 U. S. 161, 52 L. Ed. 151;

Bunch *v.* Cole, 44 Sup. Ct. 101, 263 U. S. 250, 68 L. Ed. 290.

Second Proposition.

Waivers of Proof of Loss Must be in Writing.

The distinction made by the Circuit Court of Appeals of the Tenth Circuit in its opinion in these cases is in substance that there can be no oral waiver of the terms, provisions and conditions of a fire insurance policy as to forfeiture prior to loss, but that after the loss, there can be an oral waiver. However, the contract of insurance adopted by the Legislature of the State of Oklahoma, as Section 6767 Compiled Oklahoma Statutes, 1921, does not make any such distinction, and in this connection, we call attention to the provision of the policy found in the record at page 33:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on the back hereof, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and

> as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And said policy contains the further provision:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Prior to the organization of the Circuit Court of Appeals for the Tenth Circuit, the State of Oklahoma was embraced within the jurisdiction of the Circuit Court of Appeals for the Eighth Circuit, and that Court passed upon the very questions involved in the instant case, in Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., decided December 8, 1908, 166 Fed. 231, and which case continued the law of the Oklahoma jurisdiction until the decision in the instant case by the Circuit Court of Appeals for the Tenth Circuit. In that case, the Eighth Circuit held:

> "1. Where a policy of fire insurance expressly provided that in case of loss a written and verified proof of loss should be made by the insured containing certain stated and detailed information, such proof of loss is an essential condition precedent to the company's liability, unless

waived; and where it further provided that no officer, agent, or other representative of the company should have power to waive any of its conditions except in writing indorsed thereon or attached thereto, the failure to make such proof of loss is not excused by a claimed waiver, not in writing, by an agent of the company not shown to have any express authority to make it and whose action was not ratified by the company."

The Court, in its statement of facts, pages 232 and 233, says:

"This was a suit at law to recover on two policies of fire insurance executed by the insurance company, defendant below, one for $3,500, under date December 27, 1906, insuring plaintiff's building and machinery, therein in process of construction against loss by fire until June 27, 1907, the other for $2,500, dated January 17, 1907, insuring the machinery alone against loss by fire until July 17, 1907. The building and machinery were totally destroyed by fire on May 10, 1907, prior to the expiration of the policies. The policies each contained the following provisions: (1) 'It is warranted that the premises hereby insured shall not be occupied for a longer period than thirty days, without special permission being granted in writing hereon, and re-adjustment of rate.' (2) 'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. * * *' (3) 'If fire occur the insured shall give immediate notice of any loss

thereby in writing to this company, * * * and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.' (4) 'The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.' (5) 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions

as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.'

"The amended complaint stated the facts concerning the issue of the policy, the destruction of the property by fire, and other facts entitling plaintiff to recover; but, by way of anticipating and avoiding a possible defense, averred that plaintiff duly performed each and every act and condition required of it by the terms of the policy, except that the defendant expressly waived a literal compliance with the provision of the policy requiring the proof of loss, and that said waiver occurred in the following manner: 'After the defendant had notice of the loss by fire hereinbefore mentioned, and long prior to the time limited within the provision of said policy, hereinbefore referred to, it caused its state agent for the states of Colorado and Wyoming, to wit, one O. E. Lane, to visit the scene of said fire, in company with various insurance adjusters for other companies holding insurance on said property, and the said O. E. Lane did then and there enter into and upon the ascertainment and adjustment of the loss occasioned by said fire, and did then and there personally,

at the instance of said defendant company, obtain and receive full, complete and accurate knowledge with respect to the said fire, and the loss occasioned thereby, and did report the same to the said company, who did then and there, and within the period limited by the terms and provisions of the said policy, have and receive full, accurate, and complete knowledge with respect to said loss, in each and every particular required by the terms of said policy, and otherwise, from the said Lane, so appointed by the said defendant for that purpose as aforesaid.' The defendant answered, and, amongst other things, denied that plaintiff had duly performed the conditions required of it by the policy, and particularly denied that defendant had waived a literal compliance with the provisions of the policy requiring proofs of loss within 60 days after the fire. Defendant also pleaded that plaintiff, without the consent of the defendant written upon or attached to the policy, and without readjustment of rate, occupied the premises described in the policy and used the machinery therein for a longer period than 30 days, whereby the policy became null and void.

"Upon these issues the cause was tried to the court without the intervention of a jury, and resulted in a judgment in favor of plaintiff. The Circuit Court made no special finding of facts; but the defendant, by motion to strike out evidence, and by requests for a judgment in its favor on all the evidence produced and exceptions taken to the rulings of the court thereon, raised two important questions of law which it now contends were decisive of the case and required a judgment in its favor. These questions are (1) whether there was any competent evi-

dence of waiver of the proofs of loss required by the policies, and (2) whether plaintiff occupied the building without the consent of the defendant, and without readjustment of the rate, for the period in excess of 30 days, and thereby committed a fatal breach of one of the warranties contained in the policy."

In the body of the opinion, the Court says:

"It is not and cannot be disputed that a failure to furnish proofs of loss in cases like the present constitutes a breach of a condition precedent to recovery. Plaintiff, in its petition, instead of claiming that it had performed this condition, admitted in effect that it had not done so, and justified its failure by alleging that defendant had waived its performance. Proof of the waiver consisted of oral evidence only. It tends to show that an agent of defendant company, a Mr. Lane, by its direction visited the scene of the fire soon after its occurrence in company with insurance adjusters of other insuring companies for the purpose of making an independent examination of the loss and reporting to defendant company his conclusion; that he made such examination and report, prepared for plaintiff a proof of loss under a third policy which defendant company had issued on May 5, 1907, not as a builder's risk, like the two policies in suit, but a straight term policy upon the premises as a completed structure; that Mr. Cobb, vice president of the plaintiff company, signed the proof so made out by the agent, and that the claim under that policy was paid by defendant company; that the policies in suit were two of

many which had been issued by defendant and other insurance companies on the risk, and that other proofs of loss under other policies were made out on the same occasion and signed by Mr. Cobb; that the latter, at the time of signing, believed the proofs so signed by him included proofs under the two policies in suit."

At page 234, the Court further says:

"We are relieved by the decision of the Supreme Court of the United States in the case of Northern Assurance Company *v.* Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, from much responsibility in this case. Prior to that decision there had been a diversity of views expressed by courts of the United States, both national and state, on the subject of waiver of provisions and conditions of policies of insurance by agents. In that case the Supreme Court, by Mr. Justice Shiras, exhaustively reviewed former decisions, and announced conclusions which have been since then adhered to by that court and necessarily followed by all other courts of the United States. He there declared that the principle governing contracts in general requiring them, if in writing and unambiguous, to speak for themselves, is applicable to cases of insurance contracts as fully as contracts on other subjects. He there said:

"'That it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance

policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; * * * that, where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.' "

At page 235 of the opinion, Mr. Justice Adams, continuing, says:

"The clause of the policy under consideration by the Supreme Court was exactly the same as that limiting the power of an agent in the present policies, namely:

" 'No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy

exist or be claimed by the insured unless so written or attached.'

"In Hagan *v.* Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229, and Hartford Fire Ins. Co. *v.* Wilson, 187 U. S. 467, 478 Sup. Ct. 189, 47 L. Ed. 261, the Supreme Court reasserted the conclusions stated in the Northern Assurance Company Case, and in the last-mentioned case said:

"'There is no attempt, by parol testimony, to contradict any stipulations of the policy, something which we have recently held cannot be done.'

"We have scrupulously recognized and applied that doctrine in the following cases: Modern Woodmen of America *v.* Tevis, 54 C. C. A. 293, 117 Fed. 369; Supreme Council of Royal Arcanum *v.* Taylor, 57 C. C. A. 406, 121 Fed. 66; Atlas Reduction Co. *v.* New Zealand Ins. Co., 71 C. C. A. 21, 138 Fed. 497, 9 L. R. A. (N. S.) 433; Connecticut Fire Ins. Co. *v.* Buchanan, 73 C. C. A. 111, 141 Fed. 877, 4 L. R. A. (N. S.) 758; Mulrooney *v.* Royal Ins. Co. (C. C. A.) 163 Fed. 833.

"The doctrine is a reasonable one. It tends to promote certainty in the proof of transactions, and to inculcate a salutary and wholesome regard for the very terms of a contract when deliberately put in writing by competent parties. There is, therefore, no escape from the conclusion that, as Agent Lane was not shown to have any express authority to waive the condition requiring proofs of loss, and as no such waiver was written upon or attached to the policies, there was in contemplation of law no waiver at all, unless the defendant company,

with full knowledge of the fact that an agent had attempted to waive the condition and of what he had said and done in doing so, ratified his action. No claim of ratification is made except one based on the fact that defendant paid the policy issued May 5, 1907. As proof of loss had been furnished under this policy, and thereby a legal liability had been established, we perceive no reason why the payment of that demand should dispense with a condition precedent to liability on other and different policies. Moreover, as the record is silent concerning knowledge by defendant's general officers concerning anything said or done by the agent, Lane, claimed to constitute a waiver, there is and can be no ratification."

In the case of Northern Assurance Co. *v.* Grand View Building Ass'n, 46 L. Ed. 213, 183 U. S. 308, it was held:

"1. An insurance company cannot be deemed to have waived a condition in a policy of fire insurance rendering it void in case other insurance had been or should be made upon the property unless by agreement indorsed thereon or attached thereto, because its agent had notice or knowledge of the existence of other insurance in another company at the time he delivered the policy and received the premium, where such policy also provided that 'no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions or conditions no officer, agent,

or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' "

In the body of the opinion the court says:

"We do not consider it necessary or profitable to examine in detail the decisions of the circuit courts or of the circuit courts of appeals. It is sufficient, for our present purpose, to say that the circuit court of appeals for the seventh circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (United Firemen's Ins. Co. *v.* Thomas, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406), and that the court of appeals for the eighth circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. 41 C. C. A. 207, 101 Fed. 77.

"In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

"As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.

"Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

And at pages 234-35, the court says:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand?

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and

reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by nonobservance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispenses with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

In the case of Imperial Fire Ins. Co. *v.* County of Coos, 151 U. S. 452, 38 L. Ed. 231, it was held:

"1. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.

"3. Contracts of insurance if they are clear and unambiguous, are to be taken and understood in their plain, ordinary and popular sense.

"4. Where the condition in the policy is that it shall be void and of no effect if 'mechanics are employed in the building, altering, or repairing the premises named herein', without notice to or permission of the insurance company, its violation by the insured terminates the contract of the insurer, and it cannot be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk."

"5. An instruction of the court to the jury which gave no validity or effect to such condition and its breach, but made it depend upon the question whether the acts done in violation of it, in fact increased the risk, and whether such increased risk was operative at the date of the fire, was erroneous."

In the opinion, delivered by Mr. Justice Jackson, the Court says:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and where called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the

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measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

"It is settled, as laid down by this court in Thompson *v.* Phenix Ins. Co. of Brooklyn, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their

terms are to be taken and understood in their plain, ordinary, and popular sense.

"It is entirely competent for the parties to stipulate, as they did in this case, 'that this policy should be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, * * * the premises shall be used or occupied for the purposes stated herein; * * * or the risk be increased by any means within the knowledge or control of the assured; * * * or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs.'

"These provisions are not unreasonable. * * *"

In the case of Jessie Riddlesbarger *v.* Hartford Fire Ins. Co., 19 L. Ed. 257, this Court, in passing upon the limitation clause in the policy, held:

> "A condition in a policy of insurance against the maintenance of any action to recover a claim upon the policy, unless commenced within twelve months after the loss, is valid."

In the case of Lumber Underwriters of New York *v.* Rife, 237 U. S. 605, 59 L. Ed. 1141, this Court held:

> "A fire insurance company cannot be deemed to have waived a breach of the warranty in a policy insuring lumber that a continuous space of 100 feet shall be maintained between the lumber and the mill of the assured, because, during the life of an earlier policy, of which the one in question is a renewal, the insurance company

learned that there were permanent structures between some of the lumber piles and the mill, reducing the clear space in that direction to less than 100 feet, where the policy requires any waivers to be written upon or attached to that instrument."

Mr. Justice Holmes, in delivering the opinion of the Court, said:

"When a policy of insurance is issued, the import of the transaction, as everyone understands, is that the document embodies the contract. It is the dominant, as it purports to be the only and entire, expression of the parties' intent. In the present case this fact was put in words by the proviso for the indorsement of any change of terms. Therefore when, by its written stipulation, the document gave notice that a certain term was insisted upon, it would be contrary to the fundamental theory of the legal relations established to allow parol proof that at the very moment when the policy was delivered that term was waived. It is the established doctrine of this court that such proof cannot be received. Northern Assur. Co. *v.* Grand View Bldg. Asso. 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. *v.* Grand View Bldg. Asso., 203 U. S. 106, 107, 51 L. Ed. 109, 111, 27 Sup. Ct. Rep. 27; Connecticut F. Ins. Co. *v.* Buchanan, 4 L. R. A. (N. S.) 758, 73 C. C. A. 111, 141 Fed. 877, 883. See Penman *v.* St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. Ed. 493, 30 Sup. Ct. Rep. 312; Aetna L. Ins. Co. *v.* Moore, 231 U. S. 543, 559, 58 L. Ed. 356, 366, 34 Sup. Ct. Rep. 186. There is no hardship in this rule. No rational theory of contract can be

made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. The assured also knows better than the insurers the condition of his premises, even if the insurers have been notified of the facts. If he brings to the making of his contract the modest intelligence of the prudent man, he will perceive the incompatibility between the requirement of 100 feet clear space and the possibilities of his yard, in a case like this, and will make a different contract, either by striking out the clause or shortening the distance or otherwise, as may be agreed. The distance of 100 feet that was written into this policy was not a fixed, conventional formula that there would be trouble in changing, if the insured would pay what more, if anything, it might cost. Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

"The plaintiffs try to meet these recognized rules by the suggestion that after a contract is made, a breach of conditions may be waived, 'void' only meaning voidable at the option of the insurers (Grigsby *v.* Russell, 222 U. S. 149, 155, 56 L. Ed. 133, 136, 36 L. R. A. (N. S.) 642, 32 Sup. Ct. Rep. 58, Ann. Cas. 1913B, 863): * * *"

In the case of Mrs. Anna E. Penman *v.* St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 54 L. Ed. 493, it was held:

> "2. A condition avoiding a policy of fire insurance if blasting powder be kept on the premises is not waived because the insurer's agent knew that the building insured was to be occupied by miners, whose custom it was to keep blasting powder in their homes, and for that reason charged more than the usual rate, where the policy guards against any acts of waiver or change of its conditions by providing that such waiver or change, to be effective, shall be written upon, or attached to, the policy."

In the body of the opinion, at page 498, the Court said:

> "We think also that the policy furnishes the only way by which its term can be waived. It provides against modifications by the usage or custom of trade or manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or change 'shall be written upon or attached' to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parol testimony was not needed nor admissible to interpret them. They constituted the contract between the company and the insured. No agent had power to change or modify the contract except in the manner provided. This was decided in Northern Assur. Co. *v.* Grand View Bldg. Asso. supra. Any other ruling would take from contracts the certain evidence of their

written words, and turn them over for meaning to the disputes of parol testimony."

The case of Royal Insurance Co. *v.* Ruperto Martin, as Executor of the will of Francisco Martin, deceased, 192 U. S. 149, 48 L. Ed. 385, cited by counsel in their brief, is not in point in this case for the reason that in that case, the policy provided that the company might demand that proof be furnished showing that the loss was not occasioned by or connected with, but was from causes independent of, such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power, or martial law, and holds that as the company made no such demand and denied liability, it thereby waived that proof provided for in the policy. By the terms of the contract itself, the company was not entitled to the proof specified unless they made demand for it.

In the case of D. P. Thompson *v.* Phœnix Ins. Co. of Brooklyn, 136 U. S. 287, 34 L. Ed. 408, cited by counsel, in an opinion delivered by Mr. Justice Harlan, a question of fraud is involved. It has to do with the period of limitation in which the action may be brought under the policy, and the case holds that where the insurance company tolls the insured on, promising payment from time to time, leading him to believe that they are going to pay without litigation until the statutory period of limitation has run, under those conditions the action may be maintained. This is also the universal rule and is supported by the decisions of the Supreme Court of Oklahoma, but this decision and the theory upon which the cases holding to that effect

are based is that the insurance company cannot, by its wrongful act or by fraud, gain an advantage to itself.

The provision of the Standard Fire Insurance policy requiring proofs of loss to be filed within sixty days unless the time is extended in writing by the insurer, has been held in numerous cases in the Federal Court to be a valid and binding provision, and that the filing of the proof of loss is a necessary prerequisite to the right to maintain an action upon the policy. The leading case on this subject, in the jurisdiction of which Oklahoma is a part, is the case of Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231.

In the case of Missouri-Pacific Ry. Co. *v.* Western Assurance Co., 129 Fed. 610, (Cir. Ct. D. Kans. 1st Div.), the Court, passing on the question of waiver of proof of loss, held:

> "2. Where a fire policy provided that proofs of loss should be furnished within 60 days from the date of loss, and declared that an extension of such period should be evidenced by a writing attached to or indorsed on the policy, and that the insurer should not be held to have waived any forfeiture provided for in the policy, or any condition thereby imposed on insured by any proceeding on the part of the company relating to appraisal or examination of the property insured, a forfeiture for assured's failure to furnish proofs of loss within the time required, in the absence of such written extension, was not waived by an acknowledgment of notice of loss and the commencement and continuation of negotiations for settlement without requiring proofs to be made."

This opinion was by District Judge Pollock and is based upon the holding in the case of Imperial Assurance Co. *v.* County of Coos, *supra*, and Northern Assurance Co. *v.* Grand View Bldg. Ass'n, *supra*, and in this case, the Court holds that the case of Thompson *v.* Phenix Insurance Co., 136 U. S. 287, 34 L. Ed. 408, in no wise conflicts with its decision. This latter case was cited by counsel and we think the same inapplicable to the issues here involved.

In the case of San Francisco Savings Union *v.* Western Assurance Co., 157 Fed. 695, the Circuit Court of the Northern Division of California in an opinion by District Judge Van Fleet, it was held:

> "Where an insurance contract contained a condition printed on the back of the policy that 'no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements', and among such requirements was one that proof of loss should 'be made within sixty days after the fire unless such time is extended in writing,' a complaint on the policy does not state a cause of action which shows on its face that proof of loss was not made until six months after the fire, and alleges no extension of time nor waiver."

And this District Judge, in rendering his opinion, bases it upon the decision of the United States Supreme Court in the case of Imperial Assurance Co. *v.* County of Coos, *supra*, and upon the case decided by Judge Pollock, *supra*.

In the case of Bank of South Jacksonville *v.* Hartford Fire Ins. Co., 1 Fed. (2d) 43, the District Court for the Southern District of Florida held:

> "1. As to effect of clause of policy requiring proof of loss within 60 days after loss, unless time be extended in writing by insurer, a federal District Court is governed by general law, and decision of the state Supreme Court is not binding on it.
>
> "2. Under a policy requiring proof of loss within 60 days after loss, unless such time be extended in writing by insurer, and providing that no action on it shall be sustainable unless assured shall have fully complied with all its requirements, failure to make proof of loss in stipulated time, without obtaining written extension of time, is fatal to recovery."

This decision is based upon the case of Northern Assurance Co. *v.* Grand View Bldg. Ass'n, *supra*, upon the case of Atlas Reduction Co. *v.* New Zealand Insurance Co., *supra*.

In the case of Harris *v.* North British & Mercantile Ins. Co. (5th Cir.) 30 Fed. (2d) 94, the court held:

> "1. Requirements of fire policy to effect that insured must furnish proof of loss within sixty days held to constitute a condition precedent to right of insured to maintain suit thereon as being a contractual limitation of time upon the right to make proof of loss, as well as upon the right to maintain suit without any question of forfeiture.
>
> "2. Where time of compliance with condition of proof of loss under fire policy within 60 days

> was made an essential element thereof, insured cannot show full compliance with such requirement after lapse of 60 days from date of fire."

This opinion is based upon the holding of this Court in Imperial Assurance Co. *v.* County of Coos, *supra;* upon that of the Circuit Court in San Francisco Savings Union *v.* Western Assurance Co., *supra*, and Missouri Pacific Ry. Co. *v.* Western Assurance Co., *supra;* and a writ of certiorari was attempted from the decision of the Fifth Circuit Court of Appeals in Harris *v.* North B. & M. Ins. Co., 30 Fed. (2d) 94, but denied by this Court in Lamar Harris *v.* North British & Mercantile Ins. Co., 73 L. Ed. 401.—U. S.—

In the case of Hartford Fire Ins. Co. *v.* Empire Coal Mining Co., the Circuit Court of Appeals for the Eighth Circuit, 30 Fed. (2d) 794, held:

> "7. Provision of policy that no officer, agent, or representative could waive any provision of condition, unless waiver was in writing attached to policy, did not preclude company's retention of proofs of loss for seven weeks from operating as waiver of defense that proper proofs were not furnished."

This case is referred to by counsel, and particularly do they refer to that part of the opinion at page 802 where the Court says:

> "It is insisted by counsel for defendant that there could be no waiver of the failure to furnish proper proofs of loss unless such waiver was indorsed upon the policy, since it was provided in the policy that no officer, agent, or rep-

resentative of the company should have power to waive any provision or condition unless such waiver was in writing and attached to the policy. The case of Scottish Union, etc., Ins. Co. *v.* Encampment Smelting Co., 166 F. 231 (C. C. A. 8), is cited and relied upon as holding such a provision in the policy valid and applicable to proofs of loss, and as holding further that where such provision had not been complied with suit on the policy could not be maintained.

"Though the ruling in that case is contrary to the rulings in several of the other circuits, yet we are not disposed to question its correctness at this time, inasmuch as we think it does not in any event control the case at bar. Neither in that case, nor in any of the cases cited by defendant on the same point, had there been retention of proofs of loss by the insurance company for an unreasonable length of time; in fact, no proofs of loss had been furnished within the specified time. In the case at bar proofs of loss had been furnished within the required time. Conceding, but without deciding, that they were defective, yet the company could not retain them for an unreasonable length of time and then return them with a denial of all liability without waiving the defects, if such existed; and so the authorities hold."

In the case of People's Bank of Greenville *v.* Aetna Ins. Co., 74 Fed. 507 (4th Cir.), the Court held:

"4. The making of a thorough investigation by the insurer on its own account, before receiving the proofs of loss, is no evidence of a waiver of the requirements of the policy in respect to proofs."

One of the authorities relied upon by counsel is that of Continental Ins. Co. *v.* Fortner, 25 Fed. (2d) 398 (6th Cir.), where it was held:

> "7. If insurer in terms denies liability before lapse of 60-day period for furnishing proofs of loss, it will be precluded from setting up as defense alleged failure to file such proofs within 60 days.
>
> "8. In action on fire insurance policy for destruction of dwelling by fire, evidence held to sustain finding that adjuster represented insurer, and that his statements and conduct constituted a waiver by insurer of timely proof of loss.
>
> "10. The fact that the insurer denies liability and refuses to pay on the ground of lack of contract, or lack of liability is itself a waiver of condition requiring proofs of loss."

There was never a denial of liability in the instant case, nor is a denial of liability alleged.

Another case relied upon by counsel is that of New York Underwriters Fire Insurance Co. *v.* Malham & Co., decided by Judge Kenyon of the Circuit Court of Appeals for the Eighth Circuit, 25 Fed. (2d) 415. That part of the opinion relied upon is found at page 432 as follows:

> "* * * The court probably would have been justified in finding that the proofs of loss were waived by the statements of Overstreet that all the companies would pay was the $5,500, as it seems to be the Arkansas doctrine that, where an insurance adjuster makes an offer of settlement and states that he proposes to stand on

> the offer so made, the furnishing of proof of loss is waived. Greenwich Ins. Co. *v.* State, 74 Ark. 72, 84 S. W. 1025; Security Mutual Ins. Co. *v.* Woodson, 79 Ark. 266, 95 S. W. 481, 116 Am. St. Rep. 75."

However, the court in that case was construing Section 6148 of the Arkansas statute which is set out at page 421 of the opinion and is as follows:

> "Sec. 6148. Substantial compliance with Conditions. In all actions against any fire insurance company, individual or corporation, for any claim accruing or arising upon or growing out of any policy upon personal property issued by any such company, individual or corporation, proof of a substantial compliance with the terms, conditions and warranties of such policy, upon the part of the assured, or party, individual, person or corporation to whom it may have been issued, or their assigns, shall be deemed sufficient, and entitle the plaintiff to recover in any such action. Act March 29, 1899, p. 142."

And the Circuit Court of Appeals in that case was following the construction placed upon that statute by the decisions of the State of Arkansas.

In this case, decided by Judge Kenyon, proof of loss were actually filed within 60 days from date of loss.

Another case relied upon by counsel is that of Firemen's Ins. Co. *v.* Brooks (6th Cir.), 32 Fed. (2d) 451, the Court held:

> "2. In action on fire policy, issue whether insurer waived requirement of policy for furnishing proofs of loss within 60 days was properly submitted to jury under evidence that ad-

> juster was immediately sent to premises, procured the material information, and stated proofs of loss need not be furnished."

Another case relied upon by counsel is that of Alliance Ins. Co. *v.* Enders (9th Cir.), 293 Fed. 485, in which the Court held:

> "4. Furnishing proofs of loss within the period stipulated in the policy is a condition precedent to recovery; but this requirement may be waived, or insurers may estop themselves from interposing that defense, by lulling insured into the belief that formal proofs will not be required."

The case of Globe & Rutgers Ins. Co. *v.* Prairie Oil & Gas Co., 248 Fed. 452 (9th Cir.), involves the question of sufficiency of proofs of loss. The proofs, however, were furnished.

The case of Lynchburg Cotton Mill Co. *v.* Travelers Ins. Co. (4th Cir.), 149 Fed. 954, involved a 30-day limitation clause, and because the company negotiated for a settlement for a period of ninety days after the 30-day limitation had expired, the Court held that the limitation was waived, and that the assured had thirty days after the negotiations ceased in which to start his action.

The case of Fellman *v.* Royal Ins. Co. (5th Cir.), 184 Fed. 577, dealt with the question of limitation on bringing of action, and held that the shortening of the time was a harsh condition and could be waived.

In the case of Fire Ass'n of Philadelphia *v.* Nime (5th Cir.), 9 Fed. (2d) 28, the Court held:

> "Provision of Texas standard fire policy that policy shall be void if insured carries more than $20,000 concurrent insurance is effective, unless change or waiver is written on or attached to policy as required therein, and parol proof of local agent's change or waiver thereof was inadmissible."

In view of the foregoing authorities, we insist that the question as to whether or not the condition is to be performed before or after the loss is immaterial; that the contract of insurance is the entire agreement between the parties, and that none of the terms, provisions or conditions of the fire insurance policy can be waived unless that waiver is in writing; that the conflict in the decisions of the Circuit Court of Appeals of the United States is a conflict between the Eighth and Fifth Circuit Courts of Appeals on the one hand and the Sixth and Ninth Circuit Courts of Appeals on the other hand and that the Tenth Circuit in the instant case adopted the rule of the Sixth and Ninth Circuit Courts of Appeals and that its decisions are in conflict with the decisions of the Supreme Court of the United States on the question of waiver. We contend that it cannot be said that certain provisions of the contract may be orally waived, when the contract provides that they can only be waived in writing, and that other provisions and requirements of the policy contract cannot be waived unless in writing, it being our contention that the contract is the entire agreement, and that none of the terms, provisions or conditions of the policy can be waived unless such waiver be in writing.

The construction of a fire insurance policy by the

State Court, even though the form of policy is prescribed by statute, is a construction of a contract and not a construction of a statute.

We desire to submit the following authorities on this question.

In Continental Insurance Co. *v.* Titcomb, 2 Fed. (2d) 833, the Circuit Court of Appeals for the Eighth Circuit, in the second syllabus, holds:

> "2. Fire policy, with appraisement provision, is a voluntary contract of parties, though form is prescribed by statute."

In the body of the opinion the Court says:

> "It is also true that the policy with the appraisement provision is a contract voluntarily made by the parties, notwithstanding the form is prescribed by statute. Phoenix Co. *v.* Everfresh Co. (C. C. A.) 294 Fed 51; Kollitz *v.* Insurance Co., 92 Minn. 234, 99 N. W. 892; Dunton *v.* Westchester Ins. Co. 104 Me. 372, 71 A. 1037, 20 L. R. A. (N. S.) 1058; Ebner *v.* Ohio State Ins. Co., 69 Ind. App. 32, 121 N. E. 315."

In the case of Chun Ngit Ngan *v.* Prudential Ins. Co. 9 Fed (2nd) 340, the Circuit Court of Appeals for the Ninth Circuit, in the third syllabus, holds:

> "3. Incontestable clause of life policy, though prescribed by statute of Territory of Hawaii (Rev. St. 1925, Sec. 3464, subd. 3), derives its force from consent of parties and not from statute, and construction thereof by territorial Supreme Court is not binding on the Circuit Court of Appeals."

In the body of the opinion the Court says:

> "The statutes of the territory of Hawaii provide that the standard policy shall contain a provision that the policy shall be incontestable not later than two years from its date, except for non-payment of premiums. Revised Stats. 1925, Sec. 3464 (3). And it is now contended that by reason of this provision the decision of the Supreme Court of the territory was based upon a local statute, and that the construction given that statute by the local court should be accepted by this Court. With this contention we are unable to agree. The action was based on a contract, not on a statute, and the contract derives its force and efficacy from the consent of the parties, not from any statute of the territory. As said by the Court in Duton *v.* Westchester Fire Ins. Co., 104 Me. 372, 71A 1037, 20 L. R. A. (N. S.) 1058: "But the Maine standard policy, though its form is prescribed by statute, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties."

In Abner *v.* Ohio State Life Ins. Co., 69 Ind. App. 32, 121 N. E. 315, 319; the Court said:

> "The stipulation here, while prescribed by statute, derives its force from the consent of the parties to it as a part of contract; hence it should be construed as a contract, rather than as a statutory provision; its origin, however, being kept in view."

In Cooley's Briefs on the law of Insurance, Vol 1. First Edition, at page 630, we find the rule to be,

> "The fact that a fire policy is a standard form prescribed by statute does not alter its status as a contract, which must be construed by the rules of construction usually applied to insurance contracts."

This text is supported by decisions from the state courts of Connecticut, Massachusetts, Michigan, Minnesota, New York, North Carolina and Wisconsin.

The Supreme Court of Oklahoma has passed upon this question in the case of Shawnee Mut. Fire Ins. Co., *v.* School Board of School Dist. No. 31, Grady County, 143 Pac. (Okla.) 194, and holds:

> "3. A policy of fire insurance in the standard form prescribed by chapter 38, Art. 2, Rev. L. 1910, is not to be treated as a legislative enactment after it has been accepted by the parties but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties."
>
> "4. The terms and provisions of the standard policy of fire insurance, the use of which is required by legislative enactment, are to be construed as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted."

In the body of the opinion the Court says (143 Pac., page 196):

> "(3-4). In the case of Wener et al., *v.* Pioneer Fire Ins. Co. 145 Pac.—(not yet officially reported), it is said:
>
> "A policy of fire insurance in the standard form prescribed by chapter 38, Art. 2, Rev. L.

> 1910, is not to be treated as a legislative enactment after it has been accepted by the parties, but as a voluntary contract, which, like any other contract, derives its force and efficacy from the consent of the parties. The terms and provisions of the standard policy of fire insurance, the use of which is required by legislative enactment, are to be considered as employed in the sense in which they were used and interpreted by the courts before that form of policy was adopted."

We therefore submit that the standard form of fire insurance policy prescribed by the Oklahoma statute, when accepted by the parties is a voluntary contract to be construed as such by the courts.

Waiver.

On the question of the waiver of the terms and provisions of a fire insurance policy, we think that the rule has been universally established and that it is a well-settled principle of law in the Federal Courts that where a policy or contract of insurance contains a standard provision with reference to a waiver being in writing as does the policy in the case at bar, oral evidence cannot be introduced to establish a waiver, and that there can be no waiver of any of those conditions or provisions, except such waiver be in writing, signed by the defendant or its duly authorized agent, and attached to the policy. This principle of law, we think, is amply supported by the following authority:

> Northern Assur. Co. *v.* Grand View Bldg. Ass'n, 183 U. S. 308, 46 L. Ed. 212;

Lumber Underwriters of New York *v.* Rife, 237 U. S. 605, 59 L. Ed. 1140;

Scottish Union & Natl. Ins. Co. *v.* Encampment Smelting Co., 166 Fed. 231;

Rife et al. *v.* Lumber Underwriters, 234 Fed. 32;

St. Paul Fire & Marine Ins. Co. *v.* Penman, 151 Fed. 961;

Connecticut Fire Ins. Co. *v.* Buchanan, 141 Fed. 877;

Atlas Reduction Co. *v.* New Zealand Ins. Co., 138 Fed. 497;

New York Life Ins. Co. *v.* Fletcher, 117 U. S. 519, 29 L. Ed. 934;

Imperial Assurance Co. *v.* County of Coos, 151 U. S. 452, 38 L. Ed. 231;

Fidelity Union Fire *v.* Kelleher, 13 Fed. (2d) 745;

Boston Ins. Co. *v.* Hudson, 11 Fed. (2d) 961;

Hartford Fire Ins. Co. *v.* Nance, 12 Fed. (2d) 575;

Hartford Fire Ins. Co. *v.* Jones, 15 Fed. (2d) 1;

Forkner *v.* Twin City Fire Ins. Co., 19 Fed. (2d) 419;

Fire Ass'n of Philadelphia *v.* Nime, 9 Fed. (2d) 28;

Christian & Brough Co. *v.* St. Paul Fire & Marine Ins. Co., 5 Fed. (2d) 489;

Missouri-Pacific Ry. Co. *v.* Western Assurance Co., 129 Fed. 610.

We conclude and respectfully submit that the Federal Court is bound by the construction placed upon

Statutes of Oklahoma by the Supreme Court of Oklahoma, and that as the Supreme Court has construed the statute on interest, Section 5972 Compiled Oklahoma Statutes, 1921, and has held that the interest can be recovered only from the date of judgment, that the Court erred in entering judgment for interest in this case from a date approximating a time 60 days after proofs of loss should have been filed, and that such action on the part of the trial court and the Circuit Court of Appeals for the Tenth Circuit is error.

We further submit that inasmuch as there is a conflict in the decisions of the Circuit Courts of Appeals on the question of an oral waiver of the terms, provisions and conditions of a fire insurance policy, by reason of which this Court granted the writs of certiorari, the decision of the Circuit Court of Appeals for the Eighth Circuit in Scottish Union & National Ins. Co. *v.* Encampment Smelting Co., *supra*, is in accord with the decisions of this Court in the two leading insurance decisions hereinbefore cited, Northern Assurance Co. *v.* Grand View Bldg. Ass'n, *supra*, and Imperial Assurance Co. *v.* County of Coos, *supra*, that said decision correctly and properly interprets the law pertaining to contracts, and to contracts of insurance, and that the great weight of Federal authority is to the effect that the terms and provisions of the policy requiring proofs of loss to be filed within sixty days unless the time is extended in writing by the insurer, is a condition precedent to the filing of a suit and cannot be waived except such waiver be in writing, as required by the policy contract.

And we further submit that the contention of respondent that because the filing of a proof of loss is a condition to be performed by the assured after the loss, it may be waived orally, is without foundation or reason, and that there is nothing in the policy or policies whereby this standard provision with reference to waiver is limited to conditions and warranties previous to a loss, but that the standard provision with reference to waiver applies with the same force and effect to conditions to be performed after a loss as to conditions before a loss, and that to hold otherwise would be to make a different contract than the parties themselves made, and would in effect be a judicial amendment to the contract which the parties entered into.

Respectfully submitted

F. A. RITTENHOUSE, and
H. C. THURMAN,
Counsel for Petitioners.

January, 1931.